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IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE U.S. COURTS OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS

BRIEF OF AMICI CURIAE HISTORIANS AND LEGAL SCHOLARS SUPPORTING NEITHER PARTY

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BRIEF OF AMICI CURIAE HISTORIANS AND LEGAL SCHOLARS SUPPORTING NEITHER PARTY

INTEREST OF AMICI

Amici are scholars of history and law with an important interest in the question presented and particularly in the traditional treatment of corporations under American law.[1] Amici include:

Margaret Blair is the Milton R. Underwood Chair in Free Enterprise at Vanderbilt Law School. An economist who focuses on management law and finance, her current research focuses on six areas: team production and the legal structure of business organizations, legal issues in the governance of supply chains, the role of private sector governance arrangements in contract enforcement, the legal concept of corporate "personhood," the historical treatment of corporations by the Supreme Court, and the problem of excessive leverage in financial markets.

Ruth H. Bloch, a specialist in early American intellectual, religious, and women's history, is professor emerita in the Department of History at UCLA. She is the author of VISIONARY REPUBLIC:

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[1] This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. The parties (with the exception of Respondents in No. 13-354) filed blanket consents, and Respondents in No. 13-354 have provided written consent to this brief. Pursuant to Rule 37.6, counsel for amici affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make a monetary contribution to the preparation or submission of this brief.

MILLENNIAL THEMES IN AMERICAN THOUGHT, 1756-1800 AND GENDER AND MORALITY IN ANGLO-AMERICAN CULTURE, 1650-1800. She is currently working with Naomi Lamoreaux on a book on the history of privacy rights in America and on articles entitled, "Corporations and the Fourteenth Amendment" and "Legal Constraints on the Development of American Non-Profit Groups, 1780-1900."

Eric Hilt is Associate Professor of Economics at Wellesley College. He has written extensively on the history of the business corporation in the United States. In 2009 he was the recipient of the Economic History Association's Arthur Cole Prize.

Naomi R. Lamoreaux, a specialist in U.S. business and economic history, is Stanley B. Resor Professor of Economics and History and Chair of the History Department at Yale University, and a Research Associate at the National Bureau of Economic Research. She has written THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904 AND INSIDER LENDING: BANKS, PERSONAL CONNECTIONS, AND ECONOMIC DEVELOPMENT IN INDUSTRIAL NEW ENGLAND. She is currently working with Ruth Bloch on a book on the history of privacy rights in America and on articles entitled, "Corporations and the Fourteenth Amendment" and "Legal Constraints on the Development of American Non-Profit Groups, 1780-1900."

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Elizabeth Pollman is Associate Professor of Law at Loyola Law School, Los Angeles, and the author of works on the constitutional rights of corporations and issues concerning private corporations, including *Information Issues on Wall Street 2.0*, 161 PA. L. REV. 179 (2012); *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629; and *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009).

John Joseph Wallis is Professor of Economics at the University of Maryland and Research Associate at the National Bureau of Economic Research. He is an American Economic Historian who specializes in the interaction of political and economic forces in American development, with particular attention to the role of organizations and corporations as a nexus of that interaction.

Much of the research in this brief is drawn from papers by amici, developed through several meetings of the ongoing "Corporations and American Democracy" research initiative undertaken by the Tobin Project, a non-profit research organization.

Because amici have not examined the factual questions relating to the particular corporations at issue in these consolidated cases, they file this brief in support of neither party.

SUMMARY OF ARGUMENT

Amici's historical research reveals that, in analyzing constitutional rights and liberty interests, this Court has not treated corporations and natural persons the same, nor has it treated all corporations equally. Rather, this Court has treated corporations as artificial entities distinct from natural persons and has recognized that corporations come in many types and are organized for different purposes. In general, this Court has extended rights to corporations when necessary to protect the interests of natural persons, and especially when those interests are directly related to the corporation's primary purpose. Corporate rights are thus derivative. It is important to examine the historical basis for the distinctions between corporations and natural persons, and between for-profit business corporations and nonprofit corporations (including churches, advocacy groups, and similar organizations).

This Court has been especially sparing in extending rights, especially liberty rights under the Fourteenth Amendment, to for-profit business corporations. In *First National Bank of Boston v.*

Bellotti,[2] then-Justice Rehnquist, writing in dissent, noted that this Court historically drew a distinction, for Fourteenth Amendment purposes, between the *property* and *liberty* interests of business corporations. In the decades following the adoption of the Fourteenth Amendment, the corporate "rights" recognized by this Court were largely limited to property and contract entitlements, in circumstances where the interests of the underlying shareholders or owners so required.

Justice Rehnquist acknowledged, citing *Santa Clara County v. Southern Pacific Railroad*,[3] that the Court had decided "at an early date," although "with neither argument nor discussion," that a "business corporation is a 'person' entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment" and that "[l]ikewise, it soon became accepted that the *property* of a corporation was protected under the Due Process Clause of that same Amendment."[4] But, he pointed out, the Court "soon thereafter" concluded that the *liberty* protected by the same Due Process Clause was "the liberty of natural, not artificial persons."[5]

Justice Rehnquist was correct. During the late nineteenth and early twentieth centuries, this Court parsed the various clauses of the Fourteenth Amendment in different ways, so that some of them applied to corporations but others, such as the due process protection for liberty, emphatically did not.

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[2] 435 U.S. 765 (1978).

[3] 118 U.S. 394 (1886).

[4] 435 U.S at 822 (emphasis added).

[5] *Id.* at 822.

In particular, beginning in 1886 with the case of *Santa Clara County v. Southern Pacific Railroad*,[6] the Court treated the Equal Protection Clause as applying to corporations. It also interpreted the Due Process Clause as protecting corporate property.[7] That, however, was the extent of it. In 1906, the Court held in *Northwestern National Life Insurance Company v. Riggs* that the liberty protected by the Fourteenth Amendment was "the liberty of natural, not artificial persons."[8] Nor did the Court ever hold that corporations were "persons whom a State may not deprive of 'life' within the meaning of the second clause of the second sentence"[9] or that the privileges and immunities of citizens extended to corporations.[10]

In adopting these limited protections for corporations, the Court repeatedly confirmed that business corporations remained fully subject to government regulation. In particular, the Court did

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[6] *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886). See also *Missouri Pacific Railway Co. v. Mackey*, 127 U.S. 205 (1888); *Minneapolis and St. Louis Railway Co. v. Beckwith*, 129 U.S. 26 (1889); *Charlotte, Columbia and Augusta Railroad Co. v. Gibbes*, 142 U.S. 386 (1891).

[7] See, e.g., *Minneapolis and St. Louis Railway Co. v. Beckwith*, 129 U.S. 26 (1889); *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578 (1896); *Smyth v. Ames*, 169 U.S. 466 (1898).

[8] *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1906).

[9] See *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 579 (1949).

[10] See, e.g., *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888).

not create exemptions for for-profit business corporations from generally applicable, nondiscriminatory rules. Nor did the Court base its corporate-rights jurisprudence on the notion that a corporation was a constitutionally-protected "person" in its own right. The Court always treated corporations as artificial entities.

The twentieth century saw the selective incorporation of the Press Clause[11] and the recognition of First Amendment rights for publishers and broadcasters, as well as for advocacy organizations. In *Bellotti* and successor cases, this Court also protected corporate speech, though chiefly for instrumental purposes (the interests of the audience in new contributions to the marketplace of ideas), rather than for reasons of corporate self-expression or self-actualization.

However, this Court never overruled the decisions drawing a constitutional distinction between corporate liberty and property rights. Nor has this Court ever upheld a religious liberty or free exercise claim brought by a for-profit corporation (even a closely held one).

Because amici have not examined the factual issues regarding the specific corporations at issue, they take no position on the proper disposition of the instant cases. However, their research reveals that corporations have always been treated as artificial entities under U.S. law, and that it would be inconsistent with historical practice to extend the same liberty interests to for-profit business corporations as natural persons enjoy.

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[11] *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

ARGUMENT

I. History Reveals Limited Constitutional Protections For Corporations.

This Court's earliest decisions addressing the status of corporations reveal little protection for the rights of corporations *qua* corporations. On the whole, the case law reflected a view of the corporation as an artificial entity representing an association of individuals. Further, the rights recognized were largely limited in scope to property and contract entitlements.

For example, in *Bank of the United States v. Deveaux*,[12] the Court (per Marshall, C.J.) held that a corporate entity was not a "citizen" for purposes of diversity jurisdiction, in a case involving a bank's challenge to a state tax statute:

> That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name.[13]

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[12] 9 U.S. (5 Cranch) 61 (1809).

[13] *Id.* at 86. The Court subsequently overruled *Deveaux* and held that, for purposes of diversity jurisdiction, a corporation is a "citizen" of the state in which it is incorporated. *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844). Just ten years later, the Court in *Marshall v. Baltimore & Ohio Railroad*, 57 U.S. (16 How.) 314, 325-29 (1854), changed position again, holding that a suit by or against a corporation should be regarded as a suit by or against its shareholders and adopting a conclusive presumption

Similarly, in *Bank of Augusta v. Earle,*[14] the Court held that a corporation is not a "citizen" for purposes of the Privileges and Immunities Clause of Article IV, § 2.[15]

After the adoption of the Fourteenth Amendment, this Court considered the application of the Equal Protection Clause to business corporations in *Santa Clara v. Southern Pacific Railroad.* The reported opinion begins with a statement attributed to Chief Justice Morrison R. Waite at the start of oral arguments:

> The court does not wish to hear argument on the question whether the provision in the *Fourteenth Amendment to the Constitution*, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.[16]

There is no comparable statement about corporations and the Fourteenth Amendment in the actual decision of the case because the Court deliberately avoided the constitutional questions that the railroads had hoped to raise and instead based its ruling solely on California law.

The decision to print the statement in the first place seems to have been the doing of the Court's

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that all shareholders of a corporation are citizens of the state of incorporation.

[14] 38 U.S. (13 Pet.) 519 (1839).

[15] *Id.* at 587.

[16] *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886).

reporter, J. C. Bancroft Davis. Davis had originally submitted it for the Chief Justice's approval in the form of a paraphrase, not a direct quotation. The Chief Justice responded that Davis expressed "with sufficient accuracy what was said before the argument began," but added, "I leave it with you to determine whether anything need be said about it in the report inasmuch as we avoid meeting the constitutional question in the decisions." Davis not only left the statement in the report but set the paraphrase in quotation marks.[17]

Needless to say, this provenance is odd for a statement that would be repeatedly cited as precedent by this Court and other courts, especially given that the Chief Justice's purpose in making it was precisely to avoid a ruling on the constitutional issue. The answer to the question of how the statement came to be treated as precedent is surprisingly simple: It was the doing of Justice Stephen J. Field.

Justice Field had articulated his own views on the larger constitutional issues in circuit court opinions involving a provision of California's 1879 constitution that assessed taxes on property held by railroads differently from other property.[18] Justice

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[17] For the exchange between Waite and Bancroft, see C. Peter Magrath, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 223-24 (1963); Malcolm J. Harkins, *On the Road to* Santa Clara *and Beyond: Travels with the Supreme Court, Stephen J. Field and the Corporate Person* (Feb. 2010), http://works.bepress.com/malcolm_harkins/1, accessed on January 7, 2014.

[18] One group was consolidated under the title of *The Railroad Tax Cases*, 13 F. 722 (C.C.D. Cal. 1882), and the other

Field, who heard the suits alongside a local federal judge, wrote opinions in both cases, holding that the taxes violated the railroads' rights under the Fourteenth Amendment. Justice Field explained that "private corporations consist of an association of individuals united for some lawful purpose, and permitted to use a common name in their business and have succession of membership without dissolution."[19] The individuals "do not, because of such association, lose their rights to protection, and equality of protection."[20] In Justice Field's view, the Fourteenth Amendment protects the property of persons — to whom he referred as "members" or "corporators" — who were "united" or "associated" together in a "corporation" or "union."[21] "[I]n declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws," Justice Field opined, the Fourteenth Amendment "imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property .... Unequal exactions in every form, or under any pretense, are absolutely forbidden .... It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their property of the same kind, similarly situated, at different rates."[22]

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under the title *Santa Clara v. Southern Pacific Railroad Co.*, 18 F. 385 (C.C.D. Cal. 1883).

[19] *Santa Clara*, 18 F. at 402.

[20] *Id.*

[21] *Id.* at 402-04.

[22] *The Railroad Tax Cases*, 13 F. 722, 733 (1882). The local judges wrote concurring opinions in both cases.

When Justice Field could not convince the other Justices to take a similarly broad position in the *Santa Clara* case, he turned Chief Justice Waite's statement into precedent by citing it in subsequent opinions for the Court.[23]

II. The *Santa Clara* Decision Did Not Withdraw Governmental Authority To Regulate Corporations Via Generally Applicable Laws.

However, the Court's precedents (even opinions authored by Justice Field himself) make clear that *Santa Clara* did not interfere with efforts to regulate corporations by subjecting them to generally applicable laws. Indeed, the Court most often cited *Santa Clara* in decisions upholding state regulatory statutes. Just two years after *Santa Clara*, for example, the Court upheld a Kansas statute making railroads liable for injuries to workers caused by the mismanagement or negligence of other employees.[24] Conceding the *Santa Clara* precedent "that corporations are persons within the meaning" of the Fourteenth Amendment, the Court (per Field, J.) observed that when legislation imposes "additional liabilities" on "particular bodies or associations," it does not deny them "the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." The particularly "hazardous character of the business of operating a

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[23] See, e.g., *Missouri Pacific Railway Co. v. Mackey*, 127 U.S. 205 (1888); and *Minneapolis & St. Louis Railway Co. v. Beckwith*, 129 U.S. 26, 28 (1889).

[24] *Missouri Pacific Railway Co. v. Mackey*, 127 U.S. 205 (1888).

railroad would seem to call for special legislation ... having for its object the protection of their employees as well as the safety of the public." So long as the law made all railroad corporations "subject to the same liabilities," the law was constitutional.[25]

The next year, the Court (per Field, J) similarly upheld an Iowa law mandating that railroads that failed to erect fences along their right of ways must reimburse farmers for livestock injured or killed by trains,[26] and two years after that a South Carolina law that imposed a special tax on railroads to pay the costs of the commission the state had created to regulate them (again per Field, J.).[27]

Accordingly, *Santa Clara* was never understood as barring even-handed regulation of corporations by the government. Indeed, Justice Field himself never viewed corporations in the same light as natural persons. To the contrary, he explained in his circuit court decision in *Santa Clara* that "corporations are creatures of the state" and "could not exist independently of the law." Precisely because they were its creatures, the state might prescribe the conditions "upon which they may be formed and continued."[28] That is, the state might regulate the activities of these "artificial" persons in the interests

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[25] *Id.* at 209-10.

[26] *Minneapolis and St. Louis Railway Co. v. Beckwith*, 129 U.S. 26 (1889).

[27] *Charlotte, Columbia and Augusta Railroad Co. v. Gibbes*, 142 U.S. 386 (1891).

[28] *Santa Clara v. Southern Pacific Railroad Co.*, 18 F. 385, 402 (1883).

of the "natural" persons who were its real constituents.

III. The History Of Corporate Treatment Under the Privileges & Immunities Clause Reinforces the Government's Regulatory Authority.

The Privileges & Immunities Clause provides further evidence that *Santa Clara* does not interfere with governmental authority to regulate corporations. In the decades following the Civil War, large-scale corporations began to operate on a national scale, and disputes arose when corporations sought to do business in states that had not chartered them – in particular, when corporations formed in states with lenient laws tried to set up shop in states whose laws were more restrictive. If states were required to grant corporations formed in other jurisdictions the same privileges and immunities as citizens, then state regulatory powers would be undermined.

This Court (per Field, J.) first confronted this issue in *Paul v. Virginia*, just months after the Fourteenth Amendment was ratified.[29] Although the case involved the Privileges and Immunities Clause of Article IV rather than the corresponding Clause of the Fourteenth Amendment, it served as the precedent for a long stream of Fourteenth Amendment decisions denying corporations the privileges and immunities of citizens. The *Paul* Court held that the privileges and immunities guaranteed by Article IV did not extend to the "special privileges" that states granted in the form of

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[29] *Paul v. Virginia*, 75 U.S. 168 (1869).

corporate charters. A corporation, "being the mere creation of local law," could have "no legal existence beyond the limits of the sovereignty" that created it. Other states might admit such "foreign" corporations "upon such terms and conditions" as they thought "proper to impose," or could even, if they wished, exclude them altogether. "The whole matter rest[ed] in their discretion."[30]

After *Paul v. Virginia*, this Court repeatedly upheld state laws imposing regulatory restrictions on corporations chartered by other jurisdictions, and *Santa Clara* did not hinder this stream of decisions. In the 1888 case of *Pembina Consolidated Silver Mining and Milling Company v. Pennsylvania*,[31] the Court (again per Field, J.) upheld a Pennsylvania licensing tax on corporations chartered elsewhere that opened offices in the state. The Court confirmed that the privileges and immunities protected by Article IV applied only to natural persons, not corporations, reiterating the reasoning in *Paul v. Virginia* that corporations "had no absolute right of recognition in other States" — that states not only had the authority to regulate corporations chartered elsewhere but also could "exclude [them] entirely."[32] The Court then addressed explicitly the question of the applicability of the Fourteenth Amendment to the case. Echoing, but not citing, Chief Justice Waite's statement in *Santa Clara*, the Court expressed "no doubt" that a

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[30] *Id.* at 181.

[31] *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888).

[32] *Id.* at 185.

private corporation was covered by the "inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws." But, the *Pembina Consolidated Silver Mining* Court explained, the equal protection that corporations "may claim is only such as is accorded to similar associations within the jurisdiction of the State." Nothing in the Constitution prohibited a state from "discriminating in the privileges it may grant to foreign corporations."[33]

IV. History Shows That The Fourteenth Amendment's Due Process Clause Protects Corporate Property But Not Liberty.

The *Santa Clara* line of cases arose under the Fourteenth Amendment's Equal Protection Clause. With regard to due process, this Court drew a sharp distinction between the rights of natural and corporate persons under the Fourteenth Amendment and recognized corporate rights to *property* but not to *liberty*.

In the 1906 case of *Northwestern National Life Insurance Company v. Riggs*,[34] this Court upheld a Missouri law requiring insurance companies to pay out on policies in cases where the decedent had not been completely truthful on the application for insurance but where the deception was unconnected with the cause of death. The Court took as its

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[33] *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181, 188-89 (1888); see also *Ducat v. Chicago*, 77 U.S. 410 (1871); *Liverpool Insurance Co. v. Massachusetts*, 77 U.S. 566 (1871).

[34] *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243 (1906).

starting point the principle that corporations "may invoke the protection of that clause of the Fourteenth Amendment which declares that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'"[35] But the Court reasoned that a state had the power "to regulate the relative rights and duties of all persons and corporations within its jurisdiction ... to provide for ... the public good."[36] The Court opined that Missouri's law was a reasonable exercise of the state's police powers because insurance companies had engaged in abusive practices, using innocent inaccuracies in applications as a pretext for denying claims. Moreover, because the law applied "alike to all life insurance companies doing business in Missouri," it did not deny the company "the equal protection of the laws."[37] The Court then broke new ground by declaring that the Due Process Clause of the Fourteenth Amendment did not bar the state's regulation:

> Equally without foundation is the contention that the statute, if enforced, will be inconsistent with the liberty guaranteed by the Fourteenth Amendment. The liberty referred to in that Amendment is the liberty of natural, not artificial persons.[38]

The principle that corporations were protected persons in the sense that their property could not be

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[35] *Id.* at 253.

[36] *Id.*

[37] *Id.* at 255.

[38] *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1906).

taken without due process had already been treated by the Court as a logical extension of the *Santa Clara* precedent.[39] However, *Northwestern National Life Insurance v. Riggs* was the first time this Court addressed the question of whether corporations were persons whose *liberty* was constitutionally protected as well. In asserting that they were not, the Court did not feel compelled to cite precedent. The Court evidently found the point so obvious that it needed no justification.

Indeed, the idea that the Fourteenth Amendment protected the liberty of natural persons but not corporations had long been implied by the case law. Justice Field had laid out the distinction as early as his circuit court opinion in the *Railroad Tax Cases*: the amendment protected the property of corporations because corporate property "in fact" belonged to "the corporators," but it did not protect the life and liberty of corporations because "the lives and liberties of the individual corporators are not the life and liberty of the corporation."[40]

Although *Northwestern National Life Insurance Company v. Riggs* was the first Supreme Court decision explicitly to state that corporations did not have Fourteenth-Amendment protections for liberty, the understanding of liberty on which the holding rested pervaded the late-nineteenth-century jurisprudence. The opinion in *Northwestern National Life Insurance Co. v. Riggs* defined "the liberty

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[39] See, e.g., *Covington & Lexington Turnpike R. Co. v. Sandford*, 164 U.S. 578 (1896); *Smyth v. Ames*, 169 U.S. 466 (1898).

[40] *The Railroad Tax Cases*, 13 F. 722, 747 (1882).

guaranteed by the Fourteenth Amendment against deprivation" as embracing "the right to pursue a lawful calling and enter into all contracts proper, necessary and essential to the carrying out of the purposes of such calling."[41]

This conception of liberty can be traced back through numerous opinions to Justice Field's famous dissent in the *Slaughterhouse Cases* in 1873, which in turn drew on the broader natural rights tradition of the American Revolution.[42] The "distinguishing privilege of citizens of the United States," Justice Field insisted, was an "equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life."[43] This conception of liberty referred to natural persons rather than artificial ones and addressed the importance of life and work for ordinary people, as well as the notion of an avocation or calling. The reasoning was part of a natural rights tradition that harkened back to the American Revolution.[44]

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[41] *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 253 (1906).

[42] *Slaughterhouse Cases*, 83 U.S. 36 (1873).

[43] *Id.* at 109-10.

[44] For historical work on this tradition, see especially Michael P. Zuckert, NATURAL RIGHTS AND THE NEW REPUBLICANISM (1994); Knud Haakonssen, "From Natural Law to the Rights of Man," in A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW, 1791 AND 1991 19-61 (Michael J. Lacey and Knud Haakonssen, eds. 1991), and James H. Hutson, "The Bill of Rights and the American Revolutionary Experience," in the same volume, pp. 62-97.

The Court drew the same line using the same language in *Western Turf Association v. Greenberg*.[45] The Court upheld a California statute regulating places of public amusement against a challenge by an incorporated racetrack. After opining that the statute did not violate the Fourteenth Amendment's Equal Protection Clause because it applied "alike to all persons, corporations or associations" operating in this business, the Court proceeded to hold that the company could not claim the protection of the Due Process Clause, either. Citing *Northwestern National Life Insurance Co.*, the Court declared that "the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons."[46] The same statement appeared in such twentieth century decisions as *Pierce v. Society of Sisters* (1925) and *Hague v. CIO* (1939).[47]

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[45] *Western Turf Association v. Greenberg*, 204 U.S. 359 (1907).

[46] *Id.* at 363.

[47] *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Hague v. CIO*, 307 U.S. 496, 528 (1939). The statement is also cited in *Applegate v. Travelers' Insurance Co.*, 132 S.W. 2 (1910); *Title Guaranty & Surety Co. v. Slinker*, 42 Okla. 811 (1914); *Andrus v. Business Men's Acc. Ass'n of America*, 283 Mo. 442 (1920); *American League v. Eastmead*, 15 Backes 487 (N.J. Ch. Ct. 1934); *Oney v. Oklahoma City*, 120 F. 2d 861 (10th Cir. 1941); *Finnish Workers Federation v. Horrocks*, 42 F. Supp. 411 (W.D. Wash. 1941); *Mo Hock Ke Lok Po v. Stainback*, 74 F. Supp. 852 (D. Haw. 1947); *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79 (D.C. Cir. 1949).

V. The Twentieth Century Emergence of Corporate Rights Was In Harmony With The Historical Understanding.

During the twentieth century, the Court continued to treat artificial and natural persons differently. The Court recognized that corporations were creatures of governments and, as a general rule, extended them constitutional protections only when it was necessary to safeguard the rights of the natural persons who made them up.

A. Economic Regulation Of Corporations.

For example, during the *Lochner* era, the Court invoked substantive due process to invalidate state laws affecting wages, working conditions, and public health and safety. Although some of the plaintiffs in the *Lochner*-era cases were corporations, the decisions hinged on the individual employees' liberty of contract, rather than the rights of corporations.[48]

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[48] See, e.g., *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). A federal district court later asserted this Court "implicitly [found] in several cases that corporations had a liberty of contract which was protected by the Due Process Clause," *B.G.M. Enterprises v. Harris*, 482 F. Supp. 1073, 1077 (D. Mont. 1980), but the only case it was able to cite was *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283 (1932). In fact, *Advance-Rumely Thresher* held no such thing. It involved a suit by a company (whose incorporation status was not noted) against an individual farmer, whose liberty of contract was at stake. The only mention of the word "corporation" in the decision was in a quotation from the state statute. Cf. *Insurance Corporation of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702-03 n.10 (1982) (applying minimum contacts test to corporations).

In *Hale v. Henkel*, the Court rejected a corporation's claim to the Fifth Amendment right against self-incrimination,[49] in keeping with the train of decisions that followed from *Paul v. Virginia* and *Santa Clara*. Unlike human persons, the Court opined, corporations were creatures of the states that chartered them. When a state granted "certain special privileges and franchises" to a corporation, the latter held them only "so long as it obey[ed] the laws of its creation." Hence, states could legitimately require corporations "charged with an abuse of such privileges" to produce their books and papers. The Court did not cite any precedent for this ruling; the point apparently was too obvious: "It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises," could not verify whether these franchises "had been abused." Moreover, in this instance, the Court asserted, the states' authority carried over to the federal government. Because the powers of the states were subordinate to those of Congress in matters of interstate commerce, the federal government had a similar right to compel testimony in cases involving commerce that extended across state lines.[50]

The Court was more sympathetic to the claim that the Fourth Amendment protected the corporation against unreasonable searches and seizures. Using a logic similar to Justice Field's in his circuit-court opinions in *Santa Clara* and the *Railroad Tax Cases*, the Court reasoned that a corporation was, "after all, but an association of

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[49] 201 U.S. 43 (1906).

[50] *Id.* at 74-75.

individuals." When these individuals organized themselves "as a collective body," they did not waive any "constitutional immunities appropriate to such body." Therefore, the corporation's "property [could not] be taken without compensation." The corporation could "only be proceeded against by due process of law, and [was] protected, under the Fourteenth Amendment, against unlawful discrimination." By the same token, it should not be subject to unreasonable search and seizure, and in the present case, the grand jury's subpoena was "far too sweeping in its terms to be regarded as reasonable."[51] Although this part of the opinion did not affect the disposition of the case — for other reasons the Court affirmed the order to produce the subpoenaed documents — it is noteworthy because it highlights the reluctance of the Court to base the constitutional protections afforded corporations on the entities' status as legal persons, grounding them instead in the rights of the individual human beings who made them up. The line drawn in *Hale v. Henkel* would prove to be of lasting importance.[52]

Another set of cases that distinguished the protections for liberty afforded corporations and natural persons centered on the income tax, and in particular on the right to privacy implicated by tax enforcement actions. In the 1911 case of *Flint v.*

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[51] *Id.* at 76-77.

[52] See *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977). For other examples of the ongoing vitality of the distinction, see *Wilson v. United States*, 221 U.S. 361 (1911); *Baltimore & Ohio Railroad Co. v. ICC*, 221 U.S. 612 (1911); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Bell v. Maryland*, 378 U.S. 226 (1964).

Stone Tracy Co.,[53] the Court rejected an invasion-of-privacy challenge to the provision of a tax statute that made corporate returns a matter of public record and thus open to inspection.[54] After the ratification of the Sixteenth Amendment, this pronouncement became the basis for a later appeals-court decision regarding personal income tax returns. In the Revenue Act of 1924, Congress mandated that the Commissioner of Internal Revenue "cause to be prepared and made available to public inspection" a list of the names and addresses of all tax payers "together with the amount of the income tax paid."[55] This list, which included both individual and corporate tax payers, was published in many newspapers and provoked widespread outrage until Congress repealed that part of the law in 1926.[56] Although protesters recognized that the law applied to human persons and corporations alike, they focused their ire on the harm this unwanted publicity would do to individuals, deploring the provision as "a scandalous march into the privacy of the citizen's rights in

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[53] *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).

[54] *Id.* at 175.

[55] Quoted in *Hubbard v. Mellon*, 5 F.2d 764 (D.C. Cir. 1925).

[56] The 1926 law still mandated the Commissioner of Internal Revenue to make a list of taxpayers available for public inspection, but the list no longer included the amount of tax paid. Compare §257 of the Revenue Act of 1926 (44 Stat. 9) with the same section of the Revenue Act of 1924 (43 Stat. 253).

which he thought he was protected by his constitution."[57]

Over time, this Court would become more solicitous of the privacy rights of individuals, but it would also increasingly differentiate such rights from those of corporations. As the Court declared in the 1950 case of *United States v. Morton Salt Co.*, corporations "may and should have protection from unlawful demands made in the name of public investigation," but they "can claim no equality with individuals in the enjoyment of a right to privacy." The Court went on to explain that corporations "are endowed with public attributes. They have a collective impact on society, from which they derive the privilege of acting as artificial entities.... Even if one were to regard the request for information in the case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public

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[57] "In the Gold Fish Bowl," *Chicago Daily Tribute* 8 (Jun. 4, 1924). See especially the roundup of commentary from newspapers around the country in "How Income Tax Publicity is Viewed by the Editors," *Washington Post* 2 (Oct. 26, 1924). Amici have not found any writing from this period attacking the publicity requirement as an infringement on the constitutional rights of corporations, as opposed to individuals. To the contrary, opponents of the law argued that "publication is not going to affect the banks and other financial institutions or other corporations, for their books are open to the inspection of all stockholders and are practically public. The man who is going to be hurt is the most useful man in the community and the one who can least afford it." William J. Casey, Vice President of Continental Trust Co., quoted in "Bankers Heir Assails Income Tax Publicity," *Baltimore Sun* 22 (May 24, 1924).

interest."[58] In *California Bankers Ass'n v. Shultz*, upholding the anti-money laundering provisions of the Bank Secrecy Act of 1970, the Court reaffirmed the distinction between the privacy rights of individuals and corporations.[59]

B. Corporate Speech Rights.

Beginning in the twentieth century and continuing through today, this Court has frequently upheld the constitutional claims of corporations in the context of First Amendment speech rights. But such decisions can be harmonized with the traditional distinctions this Court has drawn with respect to corporations.

For example, this Court's selective incorporation of the Press Clause in 1936[60] heralded the recognition of rights for publishers and broadcasters, which have often been zealously protected in subsequent decisions.[61] However, the First

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[58] *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

[59] *California Bankers Assn. v. Shultz*, 416 U.S. 21, 59-67 (1974).

[60] *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

[61] E.g., *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); but see *Leathers v. Medlock*, 499 U.S. 439 (1991) (upholding against

Amendment rights of the press, which are the focus of a specific textual guarantee, do not necessarily imply a broader grant of constitutionally protected liberty interests, particularly with respect to for-profit business corporations that are not part of the press. Then-Justice Rehnquist made the same point in his *Bellotti* dissent.[62]

Further, in the 1950s the Court began to recognize associational and speech rights of nonprofit advocacy organizations such as the NAACP.[63] Again, the rights of nonprofit membership corporations organized for advocacy purposes say little about the proper treatment of for-profit business corporations, as Justice Rehnquist also noted.[64]

To be sure, in *Bellotti* and successor cases, this Court has accorded First Amendment protection to speech by business corporations, but largely for instrumental purposes (the interests of the audience in new ideas and information), rather than for reasons of corporate self-expression or self-actualization.[65] This Court's statement in *Bellotti*

First Amendment challenge the application of a general state tax to cable television services).

[62] *See Bellotti*, 435 U.S. at 822 (dissenting opinion).

[63] *See NAACP v. Alabama*, 357 U.S. 449 (1958); *NAACP v. Alabama*, 377 U.S. 288 (1964); *NAACP v. Button*, 371 U.S. 415 (1963). For more recent cases involving advocacy groups, see, e.g., *Federal Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007).

[64] *See Bellotti*, 435 U.S. at 822 (Rehnquist, J., dissenting).

[65] *See Bellotti*, 435 U.S. at 804-05 (White, J., joined by Brennan and Marshall, JJ., dissenting) (speech of business corporation "is not fungible with communications emanating

that political speech does not lose First Amendment protection "simply because its source is a corporation"[66] is an affirmation of the consequentialist value of expression in the marketplace of ideas – not a reference to the right of a business corporation to autonomy or self-realization. Similarly, this Court has explained that commercial speech is protected because it "assists consumers and furthers the societal interest in the fullest possible dissemination of information."[67]

In short, this Court never overruled the decisions drawing a distinction between artificial and natural persons, or between corporate liberty and property rights. It has not used the Due Process Clause to grant exemptions to for-profit businesses from generally applicable, nondiscriminatory laws on the basis of liberty interests. Nor has this Court ever upheld religious liberty or free exercise claims brought by for-profit corporations and their

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from individuals and is subject to restrictions which individual expression is not. Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations are not 'an integral part of the development of ideas, of mental exploration and of the affirmation of self'").

[66] *Bellotti*, 435 U.S. at 784.

[67] *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561-62 (1980); *see also Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

controlling shareholders.[68] This Court has continued to rely on the nineteenth century maxim that a corporation is an "'artificial being,'"[69] and has drawn a distinction between corporations and their shareholders,[70] even when the corporation has a single shareholder.[71]

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Justice Rehnquist's dissent in *Bellotti* observed that shortly after this Court decided that a corporation is a "person" entitled to protection under the Equal Protection Clause of the Fourteenth Amendment, the Court concluded "that the liberty protected by that Amendment 'is the liberty of

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[68] See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers) (denying stay application); cf. *United States v. Lee*, 455 U.S. 252, 261 (1982) (stating in a ruling against a non-corporate Amish employer who argued that paying Social Security taxes for his employees interfered with his exercise of religion, "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes that are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress explicitly provides otherwise.").

[69] *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987).

[70] E.g., *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003).

[71] E.g., *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 160, 163 (2001).

natural, not artificial persons.'"[72] The parsing of the Fourteenth Amendment in which the Court engaged during the late nineteenth and early twentieth centuries — in cases such as *Santa Clara*, *Paul v. Virginia*, *Pembina Consolidated Silver Mining*, and *Northwestern National Life Insurance Co.* — still has much to recommend it today. At its heart was the idea that corporations do not have the same claims to constitutional protections as natural persons.

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[72] *Bellotti*, 435 U.S. at 822 (Rehnquist, J., dissenting) (quoting *Nw. Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906)).

CONCLUSION

Because amici have not examined the factual issues regarding the specific corporations at issue, they take no position on the proper disposition of the instant cases. However, their research reveals that corporations have always been treated as artificial entities under U.S. law, and that it would be inconsistent with historical practice to extend the same liberty interests to for-profit business corporations as natural persons enjoy.

Respectfully submitted.

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